LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
NOV 23 1964
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 719

ALBERT EDWARDS and S. FRANK EDWARDS,
Petitioners,

versus

UNITED STATES OF AMERICA.
Respondent.

PETITION FOR WRIT OF CERTIORARI

DICK LEE
1520 South Tamiami Trail
Sarasota, Florida
Attorney for Petitioners.

INDEX

	Page
Appendix A	20
Appendix B	37
Argument	13
Conclusion	18
Jurisdiction	4
Questions Presented	5
Statutes Involved	5
Statement of the Case	8

TABLE OF AUTHORITIES CITED

Barrett v. United States, 296 F. 2d 309	15
Bryan v. United States, 338 U.S. 552, 70 S. Ct. 317, 94 L. Ed. 335	17
Edwards v. United States, 321 F. 2d 324	18
Felton v. United States, 96 U.S. 699	14
Hargrove v. United States, 67 F. 2d 280	13
Ingram v. United States, 360 U.S. 672	15
Riggs v. United States, 280 F. 2d 949, 955	16
Spies v. United States, 317 U.S. 492 (1943)	16
United States v. Murdock, 290 U.S. 389	14
United States v. Palmero, 259 F. 2d 872	15

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No.

ALBERT EDWARDS and S. FRANK EDWARDS,
Petitioners,

versus

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI

COME NOW the Petitioners, ALBERT EDWARDS and S. FRANK EDWARDS, in the above styled cause, by and through their undersigned Attorney, and file this their Petition for Writ of Certiorari, and say:

I.

A. That on December 7, 1959, an Information was filed in the United States District Court for the Southern District of Florida charging that ALBERT EDWARDS during the months of November and December 1959, in Manatee County, Florida, was then and there engaged in the business of accepting wagers as defined in Sec. 4421 (1) (c) (2) Internal Revenue Code of 1954, and willfully and unlawfully fail to register and pay to the District Director at Jacksonville,

Florida, the special tax required by law to be paid by him and in violation of 26. U.S.C. 4411, Sec. 4412, and Sec. 7203 of the Internal Revenue Code of 1954, and an identical information was filed against the Petitioner, S. FRANK EDWARDS, except S. FRANK EDWARDS was charged only on being in the business of accepting wagers during the month of December 1959. Each were found guilty by jury as charged on June 1, 1962.

B. That thereafter your Petitioners filed a Motion for New Trial on June 8, 1962, and an Order was entered on June 19, 1962, denying their Motion for New Trial.

C. That thereafter Judgment and Commitment was entered on June 29, 1962, wherein said Order adjudged the Defendants guilty as charged and the Defendants were committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of time.

D. That thereafter the Petitioners did perfect their Appeal from the Judgment of the United States District Court for the Southern District of Florida to the United States Court of Appeal for the Fifth Circuit, New Orleans, Louisiana. The Petitioners taking the position at this time that there was no evidence from which the jury could have inferred beyond a reasonable doubt that the Petitioners had knowledge of the duties imposed upon them by the wagering tax statutes.

E. That the Appeal of the Petitioners to the United States District Court of Appeal for the Fifth Circuit was heard and on July 18, 1963, the United States Court

of Appeal for the Fifth Circuit rendered an Opinion whereby it reversed the decision of the Lower Court and dismissed the Informations. Said Opinion concluding that the Government had wholly failed to prove an essential element of the crimes charged, the convictions must be reversed and the Informations dismissed.

F. That thereafter and on the 9th day of September, 1963, the Government filed its Petition for Re-Hearing En Banc, after first filing and being granted an extension of time for filing same. That there was oral argument heard on the Government's Petition for Re-Hearing En Banc before the United States Court of Appeal for the Fifth Circuit, sitting in Dallas, Texas, and thereafter on July 10, 1964, the Court entered its Order whereby the Judgments of conviction were affirmed. It is to be noted from this Order of July 10, 1964, that Judges Jones and Bell dissented and stated in their view that these cases were properly disposed of when they were before the panel of this Court. *Edwards v. United States,* 321 F. 2d 324.

G. The Petitioners did thereafter on the 19th day of August, 1964, file their Petition for Re-Hearing En Banc wherein the Petitioners strongly urged the Court that the Government had failed to prove that the Defendants willfully failed to pay the taxes or was there any circumstantial evidence sufficient from which the jury could have inferred beyond a reasonable doubt that the Defendants had knowledge of the duties imposed upon them by the wagering tax statutes.

H. On September 23, 1964, the United States Court of Appeal for the Fifth Circuit entered its Order denying the Petition for Re-Hearing En Banc filed by the

Appellants, but it is to be noted that Judges Jones, Brown and Bell dissented and that Judge Hutcheson did not participate.

II.

A. The Petitioners petition this Honorable Court to enter its Writ of Certiorari and in support thereof say that there was no direct proof before the Lower Court that the Appellants knew of the gambling tax and willfully failed to pay same, nor was there any circumstantial evidence sufficient from which the jury could have inferred beyond a reasonable doubt that the Petitioners had knowledge of the duties imposed upon them by the wagering tax statutes. The United States Court of Appeal for the Fifth Circuit has decided an important question of federal law which has not been, but should be settled by this Court. That the United States Court of Appeal for the Fifth Circuit has rendered decisions with the decisions of another Court of Appeal on the same matter. *United States* v. *Palmero,* 259 F. 2d. 872 (3rd. Cir. 1958), *United States* v. *Cirillo,* 251 F. 2d. 638 (3rd Cir. 1957), *Ripperger* v. *United States,* 248 F. 2d. 944 (4th Cir. 1957); *United States* v. *Simon,* 241 F. 2d. 308 (7th Cir. 1957).

B. The date of the Judgment or Decree sought to be reviewed is July 10, 1964, and the date of its entry is July 10, 1964.

C. There was an Order entered on the 23rd day of September 1964, and there was an Order entered on October 23, 1964, granting Petitioners an extension of time in which to file their Petition for Writ of Certiorari, which provided that the time for filing their

Petition for Writ of Certiorari would be extended to and including November 22, 1964.

D. The provisions believed to confer on this court jurisdiction to review the judgment in question by Writ of Certiorari is set forth in Paragraph II. (A) of this Petition.

III.

A. The questions presented for review are as follows:

(1) Was there evidence from which the jury could have inferred beyond a reasonable doubt that the Petitioners had knowledge of the duties imposed upon them by the wagering tax statutes?

(2) Was the District Court's charge that the Petitioners are presumed to have known the law erroneous?

(3) If the charge as given was erroneous, was it such "plain error" as to call for reversal?

IV.

The applicable statutes which this case involves are, as follows:

26 United States Code, Section 4411, Imposition of Tax:

"There shall be imposed a special tax of $50.00 per year to be paid by each person who

is liable for tax under section 4401 or who is engaged in receiving wagers for or on behalf of any person so liable."

26 United States Code, Section 4412, Registration:

"(a) Requirement — Each person required to pay a special tax under this subchapter shall register with the official in charge of the internal revenue district . . .

(1) his name and place of residence;

(2) if he is liable for tax under subchapter A, each place of business where the activity which makes him so liable is carried on, and the name and place of residence of each person who is engaged in receiving wagers for him or on his behalf; and

(3) if he is engaged in receiving wagers for or on behalf of any person liable for tax under subchapter A, the name and place of residence of each such person.

(b) Firm or company — Where subsection (a) requires the name and place of residence of a firm or company to be registered, the names and places of residence of the several persons constituting the firm or company shall be registered.

(c) Supplemental information — In accordance with regulations prescribed by the Secre-

tary, he or his delegate may require from time to time such supplemental information from any person required to register under this section as may be needful to the enforcement of this chapter."

26 United States Code, Section 4421 (1) (C) (2), Definitions:

"(1) Wager — The term "wager" means . . .
(C) any wager placed in a lottery conducted for profit.

(2) Lottery — The term "lottery" includes the numbers game, policy, and similar types of wagering. The term does not include . . .
(A) any game of a type in which usually
(i) the wagers are placed,
(ii) the winners are determined, and
(iii) the distribution of prizes or other property is made, in the presence of all persons placing wagers in such game, and
(B) any drawing conducted by an organization exempt from tax under sections 501 and 521, if no part of the net proceeds derived from such drawing inures to the benefit of any private shareholder or individual."

26 United States Code, Section 7203, Willful failure to file return, supply information, or pay tax.

"Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority

thereof to make a return (other than a return required under authority of section 6015 or section 6016), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution."

V.

STATEMENT OF THE CASE

That the Petitioners, S. FRANK EDWARDS and ALBERT EDWARDS, father and son, were convicted under 26. United States Code, Section 7203 for the willful failure to register as gamblers and pay the federal gambling tax. The facts of the case are in conflict.

WALTER McDANIEL, an employee of the Internal Revenue Service testified that no person by the name of EDWARDS had registered to gamble or purchased a gambling stamp within the State of Florida, (Tn. 5-8).

DONE GENTGEN, a special agent for the Internal Revenue Service then testified that he executed a search warrant on a house behind the Green Palace Bar, number 119. (Tn. 15-19). The house contained what was alleged to be "bolita" (lottery) paraphernalia (Tn. 20). In the house he also found a telephone book

listing the telephone in the house as that of FRANK EDWARDS (Tn. 36).

He further testified that FRANK EDWARDS was brought to the house and placed under arrest. He talked with FRANK EDWARDS and EDWARDS said that the house searched was his and then further stated that he lived at 4515 34th Street in Tampa. He said he rented the house that was searched (Tn 45).

The next witness for the Government was DON DERRY, another member of the Intelligence Division of the Internal Revenue Service. The witness DERRY testified that he had executed a search warrant on the Green Palace Bar (Tn 67). He found FRANK EDWARDS in the bar (Tn 68). He seized ONE THOUSAND NINETY-ONE DOLLARS and FORTY-SEVEN CENTS ($1,091.47) from the person of FRANK EDWARDS (Tn 78).

The witness DERRY testified that on an occasion prior to the period of criminality charged in the Information, he had the Green Palace Bar under surveillance (Tn 78). He testified that he saw FRANK EDWARDS meet various negroes in the parking lot by the Green Palace Bar and accept packages from them (Tn 83). He further testified that he saw FRANK EDWARDS carrying a five gallon metal can (Tn 83). After the Trial Court ruled that, on appropriate proffer, the five gallon can would be admitted in evidence, counsel for the defense cross-examined the witness DERRY about the five gallon can he had seen (Tn 101).

GEORGE ROBINSON was next called as a witness by the government. He testified that he lived in a house belonging to FRANK EDWARDS, that house being next to the one that was searched (Tn 111). He lived there for a number of years before and after the period at issue (Tn 112). He stated that FRANK EDWARDS went in and out of the house behind the Green Palace Bar a lot of times (Tn 114). He said "Sunny" (FRANK) EDWARDS lived there at the time he was out there. The "Living There" might be one day a week or one day a month. While living there from 1956-1962, he had never seen any gambling, nor had he ever seen any gambling, nor had he ever heard any discussion about "SUNNY" (FRANK) EDWARDS or ALBERT EDWARDS doing any gambling. (Tn 110-121).

The witness ROBERT L. METHENY then testified for the Government. He told that after aiding in the search of the house behind the Green Palace Bar, he had discovered the five-gallon can under the house next to the house behind the Green Palace Bar (Tn 126). The can was filled with various articles (Tn 126). Under prior surveillance he had seen FRANK EDWARDS carrying a similar can from the Green Palace Bar to the house containing the alleged lottery paraphernalia (Tn 128). His cross examination was centered around the five-gallon can (Tn 128). (The contents of the can was said to be lottery material, but was never admitted in evidence.)

The next witness was WILLIAM D. FORT. His testimony was that, during a surveillance on a prior occasion, he had seen FRANK EDWARDS walk from the Green Palace Bar in the direction of the two houses behind it (Tn 133). He also saw a "colored fellow" take

something from his hatband and give it to FRANK EDWARDS (Tn 134).

ROBERT HITCHCOCK, a paid informer, testified that he purchased a lottery ticket from ALBERT EDWARDS on November 5, 1959 (Tn 143). He said that he saw the others purchasing lottery tickets from ALBERT (Tn 143). He then purchased another ticket from ALBERT on December 2, 1959 (Tn 144). This was purchased in the Green Palace Bar where other purchases were being made. (Tn 144).

LESTER OWENS then testified that although he had been in the Green Palace Bar practically every day and night, he had never seen any gambling there (Tn 153). He saw individuals giving paper sacks from the mailbox (Tn 154).

LAWRENCE THOMAS, a paid informer and presently incarcerated as a felon, testified that he had purchased a lottery ticket from ALBERT EDWARDS (Tn 157).

A former State Beverage Officer, THOMAS D. ANDERSON, testified that he saw ERNEST SMITH give a package to FRANK EDWARDS and that the two of them remained inside the building that later was found to contain the alleged lottery paraphernalia (Tn 171). The witness then testified as to searching the same house and finding various items that were, in his opinion, lottery paraphernalia (Tn 172-173). He then explained how a lottery is conducted (Tn 177-182). He then discussed the materials found outside the house in question, but were never admitted in evidence (Tn 183).

A gentleman from the Telephone Company, JOEL BRUCE MC REE, testified that FRANK EDWARDS had ordered the telephone in the house in question (Tn 243). The Government closed their case and the Court denied the Defendant's Motion for a Judgment of Acquittal (Tn 250) as it did at the close of all the evidence. Both of the Defendants testified, denying their guilt. FRANK EDWARDS admitted that he owned the houses behind the Green Palace Bar and the Green Palace Bar, but that he lived in Tampa. (Tn 256). He testified further that the Green Palace Bar was leased and that other people lived in the houses behind it and that he only visited the area occasionally. (Tn 257).

In the conclusion thereof, one of the charges of the District Court was as follows:

> "Now, you will note that the omission or failure to act charged in the information is alleged to have been willfully done. A failure to act is willfully done if done voluntarily and purposely and with a specific intent to fail to do what the law requires to be done. That is to say, with that purpose either to disobey or disregard the law.
>
> It is not necessary for the prosecution to prove knowledge of the accused that a particular act or failure to act is a violation of law unless and until outweighed by evidence to the contrary. The presumption is that every person knows what the law forbids and what the law requires to be done."

VI.

ARGUMENT

It is conceded that the Government offered testimony from which the jury could have concluded that the Petitioners were engaged in the gambling business during that period of time alleged in the Informations, to-wit: S. FRANK EDWARDS during the month of December 1959, and ALBERT EDWARDS during the months of November and December 1959. There was no evidence; however, from which the jury could have inferred beyond a reasonable doubt that the Petitioners had knowledge of the duties imposed upon them by the wagering tax statutes. And this is so in reviewing the sufficiency of the evidence and viewing same in the light most favorable to the prosecution and permissible inferences supported by the evidence.

The United States Court of Appeal for the Fifth Circuit, by its Order of July 18, 1963, stated that the statutory definition of the crime of failure to pay a tax includes the element of willfulness, "a specific wrongful intent, that is, actual knowledge of the existence of obligation and a wrongful intent to evade it, is of the essence." *Hargrove* v. *United States,* 67 F. 2d. 280.

It is conceded that ignorance of the law is no defense to crime, except that, where willfulness is an element of the crime, ignorance of a duty imposed by law may negative willfulness in failure to perform the duty. *Hargrove* v. *United States,* supra.

It is true that some of the activities of each of the

Petitioners could have been said to have been done in secrecy; however, the Petitioners maintain that their secrecy was based upon fear of prosecution under state law prohibiting gambling. *United States* v. *Murdock*, 290 U. S. 389. The Defendant was convicted of a misdemeanor under the predecessor statute to 26 United States Code, Section 7203 for refusal to answer certain questions put by revenue agents. Defendant maintained that his refusal to answer was based upon fear of prosecution under state law. The Court, reversing the conviction in reliance upon *Felton* v. *United States*, 96 U. S. 699 found error in the charge regarding the element of willfulness:

> "Congress did not intend that a person, by reason of bona fide misunderstanding as to his liability for the tax, as to his duty to make a return, or as to the adequacy of the records he maintained, should become a criminal by his mere failure to measure up to the prescribed standard of conduct. And the requirement that the omission in these instances must be willful, to be criminal, is persuasive that the same element is essential to the offense of failing to supply information.
>
> * * * *
>
> The Respondent's refusal to answer was intentional and without legal justification, but the jury might nevertheless find that it was not prompted by bad faith or evil intent, which the statute makes an element of the offense."

290 U. S. 396-398

Subsequent cases involving failure to report or pay taxes have closely followed the rule in Murdock. *Barrett* v. *United States,* 296 F. 2d 309, *United States* v. *Palmero,* 259 F. 2d 872.

It is to be noted that the United States Court of Appeal in reversing itself by its Order in this said cause on July 10, 1964, stated that it believes that the answer to this cases lies in *Ingram* v. *United States,* 360 U. S. 672. This case has no parallel to the case of *Ingram* v. *United States,* supra. In the Ingram case the Defendants had been engaged in a closely organized and large-scale operation of a numbers game in violation of state law from 1954 to 1957. They made every effort to conceal the operation, they used false license plates, evasive routes and false names, and even attempted bribes. It is to be noted that the Informations filed in these cases charged ALBERT EDWARDS with dealing in gambling activities for only the months of November and December 1959, and S. FRANK EDWARDS for only the month of December 1959. There was no great effort to conceal the operation, if any there was, as even the telephone was in the name of S. FRANK EDWARDS and when the arrest was made, the Petitioner, S. FRANK EDWARDS, after being searched, informed the officers that he had additional money upon his body that they had not found. It is also respectfully called to the Court's attention that there is no evidence whatsoever that ALBERT EDWARDS was ever in the lottery business prior to November 1959. Conceded, S. FRANK EDWARDS admitted to having been arrested in 1949 on the charge of lottery, but the Government refused

and/or failed to inquire as to whether or not he was convicted of the charge. Further, as to ALBERT EDWARDS, and construing the testimony in light most favorable to the Government it hardly proves that ALBERT EDWARDS was "engaged in the business of accepting wagers." We may state the case against him very simply, outside of being the son of S. FRANK EDWARDS: Two paid informers testified that he sold lottery tickets, and one of the paid informers testified that he saw him sell tickets to others. Can it be said that the inference of guilt of ALBERT EDWARDS be drawn beyond a reasonable doubt, as required in *Riggs* v. *United States,* 280 F. 2d. 949, 955. As said in *Spies* v. *United States,* 317 U. S. 492 (1943):

> "It may well mean something more as applied to non-payment of tax then when applied to failure to make a return. Mere voluntary and purposeful, as distinguished from accidental omission to make a timely return might meet the test of willfulness. But in view of our traditional aversion to imprisonment for debt, we would not without the clearest manifestation of congressional intent assume that mere knowing and intentional default in payment of a tax, where there had been no willful failure to disclose the liability, is intended to constitute a criminal offense of any degree. We would expect willfulness in such a case to include some element of evil motive and want of justification in view of all the financial circumstances of the taxpayer."

Neither of the Petitioners were requested to register and purchase a gambling stamp, nor was any notice

sent to them, neither was it shown that the newspapers had carried any publication of trials or other notices concerning said tax, or was any other evidence offered so that the jury could have inferred beyond a reasonable doubt that the Petitioners had knowledge of the wagering tax statutes.

Further, the Defendants urge that the District Court's charge to the jury that the Defendants are presumed to have known the law is erroneous and reversible error. As most ably stated by the dissenting opinion in the case before us, there is no place in this case for pedagogical dispute over inference versus presumption. The Court further stated in said opinion: "Nor for this particular crime can I see how the Government meets its burden of showing willful failure to pay unless it first proves, directly or circumstantially that the Petitioners knew that some tax was payable. No doubt the evidence supports the inference that the Petitioners were engaged in the numbers racket and were aware that it was against Florida law, but none of the indicia elaborated on the Court's opinion, such as furtiveness, size of the operation, concealment of the telltales of the activity, or the like, even begin to show that this indicated an awareness that a federal tax was due." The learned Judge writing said dissenting opinion further states that the would be the first to join in a reversal and remand, *Bryan* v. *United States*, 338 U. S. 552, 70 S. Ct. 317, 94 L. Ed. 335, so that the Government could have the opportunity of meeting its burden through circumstantial evidence.

The Petitioners respectfully bring to this Honorable Court's attention that the Government urged the United States Court of Appeal for the Fifth Circuit by its

Petition for Re-Hearing En Banc filed by said Court, that a proper disposition of the case would be the granting of a new trial. The Petitioners believe that these cases were properly disposed of when they were before the panel in *Edwards* v. *United States,* 321 F. 2d. 324.

WHEREFORE, Petitioners pray that a Writ of Certiorari may be issued out of this Court to the United States of America; that the record to determine the validity of said Order of July 10, 1964 is before this Court and that this Honorable Court will proceed to review said Order, and determine that it is erroneous and void, and will quash said Order and will grant unto your Petitioners such other and further relief as may seem proper.

DICK LEE
Attorney at Law

DICK LEE
1520 South Tamiami Trail
Sarasota, Florida
Attorney for Petitioners.

CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true copy of the foregoing Petition for Writ of Certiorari has been furnished, by mail to THOMAS J. HANLON, III., ESQUIRE, Assistant United States Attorney, P. O. Box 2841 Tampa, Florida, this the 12th day of November, A. D., 1964.

Dick Lee
Attorney at Law

DICK LEE
1520 South Tamiami Trail
Sarasota, Florida
Attorney for Petitioners.

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19827

ALBERT EDWARDS,
Appellant,

versus

UNITED STATES OF AMERICA,
Appellee.

No. 19828

S. FRANK EDWARDS,
Appellant,

versus

UNITED STATES OF AMERICA,
Appellee.

Appeals from the United States District Court for the Southern District of Florida.

(July 18, 1963.)

Before RIVES, CAMERON and HAYS,* Circuit Judges.

HAYS, Circuit Judge: Defendants appeal from judgments of conviction in the United States District Court for the Southern District of Florida, Joseph P. Lieb, J., and a jury, for "willful" failure to pay the special federal tax on persons engaged in the business of accepting wagers. 26 U.S.C. §§4401, 4411, 4412, 7203. It is conceded that defendants did not pay the tax. There was no proof, however, that defendants were aware of the federal tax and "willfully" refused to pay it. We hold that such proof was indispensable, and accordingly reverse both convictions and direct that the informations be dismissed.

It is unnecessary to review the evidence. Suffice it to say that there was ample proof from which the jury could conclude that defendants were engaged in the gambling business.

Appellants were convicted under §7203 of the Code (26 U.S.C. §7203) which section provides:

> "Any person required under this title to pay any estimated tax or tax . . . who *willfully* fails to pay such estimated tax or tax . . . shall, in addition to other penalties provided by law, be guilty of a misdemeanor . . ." (emphasis supplied).

The government argues that ignorance of the law is no excuse and that evidence that defendants engaged in gambling as a business, together with the concession

*Of the Second Circuit, sitting by designation.

that they did not pay the required tax, is sufficient to support a conviction.

But this court has long held that, where the statutory definition of the crime of failure to pay a tax includes the element of willfulness, "a specific wrongful intent, that is, actual knowledge of the existence of obligation and a wrongful intent to evade it, is of the essence". *Hargrove v United States*, 67 F. 2d 820 (5th Cir. 1933).

In *Yarborough v United States*, 230 F. 2d 56, 61 (4th Cir.), cert. denied, 351 U.S. 969 (1956), the Court of Appeals for the Fourth Circuit, citing the *Hargrove* case and *United States v Murdock, infra*, said:

> "Ignorance of the law is no defense to crime, except that, where willfulness is an element of the crime, ignorance of a duty imposed by law may negative willfulness in failure to perform the duty."

In *United States v. Murdock*, 290 U.S. 389 (1933) the defendant was convicted of a misdemeanor[1] under the predecessor statute to 26 U.S.C. §7203 for refusal to answer certain questions put by revenue agents. De-

---

[1]The law is settled that in a *felony* prosecution for "willful" attempt to "evade or defeat any tax", 26 U.S.C. §7201, or conspiracy to violate that section, the evidence must show that the defendant knew of the tax, and took some "affirmative action" (such as acts of concealment), with a "bad purpose" to prevent the government from collecting its revenue. *Spies v United States*, 317 U.S. 492 (1943); *Ingram v United States*, 360 U.S. 672 (1959); *United States v Shaffer*, 291 F. 2d 689 (7th Cir.), cert. denied, 368 U.S. 915 (1961); *United States v Mollet*, 290 F. 2d 273 (2d Cir. 1961); *Wardlaw v United States*, 203 F. 2d 834 (5th Cir. 1953); *United States v Martell*, 199 F. 2d 670 (3d Cir. 1952), cert. denied, 345 U.S. 917 (1953).

fendant maintained that his refusal to answer was based upon fear of prosecution under state law. The Court, reversing the conviction in reliance upon *Felton v. United States,* 96 U.S. 699 (1877) found error in the charge regarding the element of willfulness:

> "Congress did not intend that a person, by reason of a bona fide misunderstanding as to his liability for the tax, as to his duty to make a return, or as to the adequacy of the records be maintained, should become a criminal by his mere failure to measure up to the prescribed standard of conduct. And the requirement that the omission in these instances must be willful, to be criminal, is persuasive that the same element is essential to the offense of failing to supply information.
>
> . . . .
>
> The respondent's refusal to answer was intentional and without legal justification, but the jury might nevertheless find that it was not prompted by bad faith or evil intent, which the statute makes an element of the offense."

290 U.S. at 396-98.

Subsequent cases involving failure to report or pay taxes have closely followed the rule in *Murdock.* See, e.g., *Barrett v. United States,* 296 F. 2d 309 (5th Cir. 1961); *United States v. Palmero,* 259 F. 2d 872 (3d Cir. 1958) ("mere laxity, careless disregard of the duty imposed by law, or even gross negligence, unattended by 'evil motive' are not probative of 'willfulness' "); *United States v Cirillo,* 251 F. 2d 638 (3d Cir. 1957),

cert. denied, 356 U.S. 949 (1958) ("['willfulness' requires] knowledge of the legal obligation"); *Ripperger v United States,* 248 F. 2d 944 (4th Cir. 1957), cert. denied, 355 U.S. 940 (1958); *United States v Litman,* 246 F. 2d 206 (3d Cir.), cert. denied, 355 U.S. 869 (1957) (the omission must be "advertent" and motivated by "bad purpose"); *Yarborough v United States,* 230 F. 2d 56 (4th Cir.), cert. denied, 351 U.S. 969 (1956); *Pappas v United States,* 216 F. 2d 515 (10th Cir. 1954); 10 Mertens, Law of Federal Income Taxation §55A.09 (1958).

While the cases we have cited were concerned with taxes other than the gambling tax, we can conceive of no reason why the same rule should not apply to failure to comply with the gambling tax provisions. The legislative history of the gambling tax reveals no intention to impose a stricter standard in gambling cases than in other tax cases. See H. Rep. 586, 82d Cong., 1st Sess. (1951), reproduced 2 U.S. Code Cong. & Admin. Serv. 1781, *at* 1837-44 (1951); S. Rep. 781, 82d Cong., 1st Sess. (1951), reproduced 2 U.S. Code Cong. & Admin. Serv. 1969, *at* 2089-96 (1951).

United States v Simon, 241 F. 2d 308 (7th Cir. 1957) involved failure to pay the gambling tax. The court in construing §7203 quoted extensively from a number of gambling tax cases which required a showing of knowledge of the statute violated, and then held:

> "Defendant had knowledge of the law and intentionally refused to comply. There is no proof that such refusal was in good faith."

241 F. 2d at 312.[2]

We conclude that since the government wholly failed to prove an essential element of the crimes charged, the convictions must be reversed and the informations dismissed.[3]

Reversed and informations dismissed.

CAMERON, Specially Concurring:

I concur fully in the able opinion of Judge Hays and would add the following comments.

---

[2]In other cases arising under these statutes, where the issue of willfullness was not raised, there was evidence that the defendant knew of the requirements. *United States v Shaffer*, 291 F. 2d 689 (7th Cir.), cert. denied, 368 U.S. 915 (1961) (one of defendants had registered, served as front for others); *Rutherford v United States*, 264 F. 2d 180 (9th Cir.), cert. denied, 359 U.S. 1003 (1959) (asked if he knew of the requirements, defendant replied that they were inapplicable because he was not a bookmaker); *Brown v United States*, 249 F. 2d 306 (5th Cir. 1957), cert. denied, 356 U.S. 924 (1958) (defendant had complied in prior years); *Contreras v United States*, 213 F. 2d 96, 99 (5th Cir. 1954) (defendant had been warned to pay the tax but failed to do so).

[3]We may assume, without deciding, that in cases involving nonpayment of *income tax, e.g. Holland v United States*, 348 U.S. 121 (1954); *Spies v United States*, 317 U.S. 492 (1943); *Wardlaw v United States*, 203 F. 2d 884 (5th Cir. 1953), the almost universal knowledge of the existence of that tax would justify placing the initial burden of proof of ignorance on the defendant. Cf. *Abdul v United States*, 254 F. 2d 292 (9th Cir. 1958), and 278 F. 2d 234 (9th Cir. 1960), cert. denied, 364 U.S. 832 (1960) (two justices dissenting) (withholding tax). There is absolutely no evidence, however, to support our dissenting colleague's basic premise that the federal gambling tax is equally well known, nor may we take judicial notice of such a dubious proposition. IX Wigmore Evidence §2571 (1940). Defendants' knowledge of the tax, like all other elements of the crime, was therefore to be proved by the government.

It cannot be mentioned too often that prosecutions such as these which we are reviewing are prosecutions for the violation of federal taxing laws, not for the violation of gambling laws. And, "in construing [the statutes] we would not be justified in resorting to collateral motives or effects [a congressional desire to suppress wagering] which, standing apart from the federal taxing power, might place the constitutionality of the statute in doubt." *United States v. Calamaro*, 1957, 354 U.S. 351, 358. In short, whether one gambles or not is of no concern to the federal government, except insofar as the taxing power alone is involved.

Judge Rives suggests in his dissent that to require affirmative proof that the defendants are aware of the taxing requirements will make convictions exceedingly rare. Besides the fact that we do not hold here that positive, affirmative proof is required, if that be the result, so be it. Such a possibility does not warrant, in my opinion, the suggestion in the dissent that we take judicial notice of the fact that all persons engaged in the gambling business are aware of the requirements. In dealing with this serious business of taking citizens' liberties, we are not privileged to assume that the "tax is so well known as to be one of the most frequent subjects of conversation among professional gamblers." The fact is that I doubt exceedingly if it is true that all "professional" gamblers know of the tax. Nor does such a possibility warrant a holding that defendants affirmatively establish ignorance of the requirements. To do so would certainly put the burden of proving innocence on the defendants, a result which is clearly unconstitutional. Moreover, taking judicial notice of defendants' knowledge would in effect be to convert the crime charged to imprisonment for

debt to the government, rather than for evasion of tax liabilities.

As Judge Rives states in his dissent, the issue of the correctness of the charge including in part: ". . . The presumption is that every person knows what the law forbids and what the law requires to be done . . ." is not before us. But necessarily before us is the old adage so often propounded in criminal cases: "Ignorance of the laws is no excuse."

This case is really not an exception to that general rule. Ignorance of the criminality of evading taxes is no excuse, if one wilfully evades the tax, thus committing the crime. One must know, however, of the positive requirements of the federal law that one must register and pay the tax before he can wilfully evade it. It may be that this is the difference between sins of commission and sins of omission. It is a part of our legal heritage, however, that courts of law traditionally mete out punishment for sins of commission. Judgments on sins of omission are usually reserved for a Higher Court sitting at a later Day.

RIVES, Circuit Judge, Dissenting:

As the Court says, "there was ample proof from which the jury could conclude that defendants were engaged in the gambling business." Neither of them had registered for or paid the tax as required by 26 U.S.C.A. §4411 and §4412. The Court holds, however, that, as a matter of law, there was insufficient evidence to prove that the defendants' failure to register for and pay the tax was "willful" in the sense of the statute making such failure a misdemeanor, 26 U.S.C.A. §7203. As I un-

derstand the opinion, the Court in effect holds that the Government must affirmatively prove as a part of its case "that defendants were aware of the federal tax," that they knew of the duty imposed by law.

The gambling business in which the defendants were engaged consisted of a lottery or bolita operation of considerable scope conducted from a house admittedly owned by Frank Edwards. A search of the house under a search warrant disclosed the paraphernalia used in lottery or bolita operations; viz., memo pads, adding machine tapes, tally sheets or recap sheets of sellers or pickup men, cards used to notify buyers of the winning number, two short wave radios, and a telephone listed in the name of Frank Edwards.

A qualified expert on bolita and lottery operations testified to the necessity of keeping on hand a large amount of cash. When Frank Edwards was arrested at the Green Palace Bar in front of the house from which the lottery was conducted, he had in his pocket $71.47 and in a bag on his person $1,091.47. There was considerable testimony about a five-gallon can which Frank Edwards had on occasions carried. The can filled with various lottery paraphernalia was found under the house next door to that from which the operations were conducted. Frank Edwards had been observed meeting various Negroes in the parking lot by the Green Palace Bar and accepting packages from them; he had been observed going in and out of the house where the lottery was conducted.

Two paid informers had purchased lottery or bolita tickets from Albert Edwards in the Green Palace Bar. The bolita tickets which they purchased were intro-

duced in evidence. They had also seen other persons making similar purchases from Albert Edwards.

At the time of his arrest, Frank Edwards admitted ownership of the house, and the officer testified: "I asked him who lived in the house, and he said he rented it out, but he refused to tell me who it was." Upon the trial, Frank Edwards took the stand and testified that he had rented the house to Mahalia Seabrook and Johnny Simpson, and produced a claimed written lease which was introduced in evidence. He admitted having a telephone in the house. He denied being in the lottery or bolita business. On cross-examination, he further testified:

> "Q. Is it your testimony here today that you have never engaged in the bolita business?
> "A. That's right.
> "Q. Ever; is that correct?
> "A. (No response)
> "Q. Is that your testimony today, Mr. Edwards?
> "A. I am trying to think back.
> "Q. You are under oath, and I want you to take your time and reflect.
> "A. Yes. Back in '49, I think it was.
> "Q. You were in the bolita business?
> "A. I got arrested.
> "Q. You were here in the Courtroom and heard various witnesses testify that you were delivered sacks of I don't know what. What is your statement with respect to those sacks that they discussed as being delivered to you by various people?

"A. My statement is that I didn't receive any sacks from no one."

Albert Edwards also testified upon the trial. He was the son of Frank Edwards. He simply denied having made any of the sales of bolita tickets to which the Government witnesses had testified.

It is significant on the present issue that neither defendant testified that he was not aware of the gambling tax or was ignorant of the duty imposed by law.

The foregoing is a brief summary of the evidence which the Court very properly holds to be ample proof from which the jury could conclude that defendants were engaged in the lottery or bolita operation. Frank Edwards fits the description of the "banker" and Albert Edwards that of the "writer" in *United States v. Calamaro,* 1957, 354 U.S. 351, 353. If, as the Court now holds, it is necessary, as a part of the Government's case, to go further and affirmatively prove that the defendants were aware of the tax, that they knew the law; then, I apprehend that convictions for willful failure to pay the gambling tax will become exceedingly rare.

It seems to me that the element of willfulness, including an awareness of the tax or knowledge of the law, may be inferred from the circumstances attending the conduct of the lottery or bolita operation. I understand that to be the effect of the holdings both of this Court and of the Supreme Court in the *Ingram* case. *Ingram v. United States,* 5 Cir. 1958, 259 F. 2d 886; affirmed in part and reversed in part, 360 U.S. 672.

True, this case does not present as large an operation or as much effort to conceal the operations as did *Ingram*. However, the size of the operation cannot be controlling, and there was in this case some effort at concealment; for example, the attempt to hide behind a fictitious lease, and the placing of the five-gallon can containing lottery paraphernalia under the adjacent house. Certainly the operations were not so brazen and unconcealed as to prevent the defendants from denying in toto any participation in them.

The informations upon which the defendants were tried and convicted charged that they willfully failed both to register with the District Director and to pay the special gambling tax. If they had registered but had simply failed to pay the tax, the case might stand differently, but here they failed to do both. As said in *Spies v. United States*, 1943, 317 U.S. 492, 497, 498:

> "The difference between willful failure to pay a tax when due, which is made a misdemeanor, and willful attempt to defeat and evade one, which is made a felony, is not easy to detect or define. Both must be willful, and willful, as we have said, is a word of may meanings, its construction often being influenced by its context. *United States v. Murdock*, 290 U.S. 389. *It may well mean something more as applied to nonpayment of a tax than when applied to failure to make a return. Mere voluntary and purposeful, as distinguished from accidental, omission to make a timely return might meet the test of willfulness.* But in view of our traditional aversion to imprisonment for debt, we would not without the clearest mani-

> festation of Congressional intent assume that mere knowing and intentional default in payment of a tax, *where there had been no willful failure to disclose the liability,* is intended to constitute a criminal offense of any degree. We would expect willfulness in such a case to include some element of evil motive and want of justification in view of all the financial circumstances of the taxpayer." (Emphasis supplied.)

Holland v. United States, 1954, 348 U.S. 121, 139, involved the more serious felony charge of willfully attempting to evade income taxes. Under the caption of "Willfulness Must be Present," the Court said:

> "A final element necessary for conviction is willfulness. The petitioners contend that willfulness 'involves a specific intent which must be proven by independent evidence and which cannot be inferred from the mere understatement of income.' This is a fair statement of the rule. Here, however, there was evidence of a consistent pattern of underreporting large amounts of income, and of the failure on petitioners' part to include all of their income in their books and records. Since, on proper submission, the jury could have found that these acts supported an inference of willfulness, their verdict must stand. *Spies v. United States, supra,* at 499-500."

It seems to me that proof that the defendants engaged in a gambling *business* also involves "evidence of a consistent pattern," that is, numerous sales and

redemptions of lottery or bolita tickets. Indeed, from Frank Edwards' testimony on cross-examination which I have quoted, the jury might well have concluded that he had been engaged in the bolita business as far back as 1949.

With deference to my brothers, it seems to me utterly unrealistic and extremely naive for either the jury or the court to assume that persons engaged in the gambling business are unaware of the federal gambling tax. I have no doubt that that tax is so well known as to be one of the most frequent subjects of conversation among professional gamblers.

So far as I am aware, the present holding is without precedent in its imposition upon the Government of the burden of proving that the defendants knew the law, which was plain, definite and well settled for many years. The situation was different in *United States v. Murdock*, 1933, 290 U.S. 389, 396:

> "It follows that the respondent was entitled to the charge he requested with respect to his good faith and actual belief. *Not until this court pronounced* judgment *in United States v. Murdock, 284 U.S. 141, had it been definitely settled that one under examination in a federal tribunal could not refuse to answer on account of probable incrimination under state law.* The question was involved, but not decided, in Ballman v. Fagin, 290 U.S. 186, 195, and specifically reserved in Vajtauer v. Comm'r of Immigration, 273 U.S. 103, 113. The trial court could not, therefore, properly tell the jury the defendant's assertion of the privilege was so

> unreasonable and ill founded as to exhibit bad faith and establish willful wrongdoing. This was the effect of the instructions given. We think the Circuit Court of Appeals correctly upheld the respondent's right to have the question of absence of evil motive submitted to the jury, and we are of the opinion that the requested instruction was apt for the purpose." (Emphasis supplied.)

In a case like this where the law is plain, definite and well settled, certainly the defendants must present some evidence of their ignorance of the law before the Government is called on to prove that they were aware of the tax or of their duty under the law. As has been said, while each of the defendants testified, neither of them professed any ignorance of the law. In *Cruz v. United States,* 10 Cir. 1939, 106 F. 2d 828, 830, Judge Phillips said:

> "Furthermore, if there was a want of knowledge as to the existence of Section 12 on the part of the defendants, that was a fact peculiarly within their knowledge, and when the government established a prima facie case, the burden of adducing evidence to rebut the presumption of such knowledge rested on the defendants. Blumenthal v. United States, supra [8 Cir. 1937, 88 F. 2d 522, 530]; Crapo v. United States, 10 Cir., 100 F. 2d 996, 1001, and cases cited in note 4."

Our own case of *Wardlaw v. United States,* 5 Cir. 1953, 203 F. 2d 884, 885, involving the felony charge of

attempting to evade income tax, similarly treated the burden of proceeding:

> "It is now settled that 'willfully' as used in this offense, means more than intentionally or voluntarily, and includes an evil motive or bad purpose, so that evidence of an actual *bona fide* misconception of the law, such as would negative knowledge of the existence of the obligation, would, if believed by the jury, justify a verdict for the defendant."

Continuing in *Wardlaw*, we said: "Claimed ignorance, however, could hardly be established so conclusively as to justify a directed verdict."

The present holding is that, without any evidence or indication that the defendants were ignorant of the law or unaware of the federal tax, the district court should have entered a judgment of acquittal. The district court did submit the issue of willfulness, as follows:

> "Now, you will take note that the omission or failure to act charged in the information is alleged to have been willfully done. A failure to act is willfully done if done voluntarily and purposely and with a specific intent to fail to do what the law requires to be done. That is to say, with that purpose either to disobey or disregard the law.
>
> "It is not necessary for the prosecution to prove knowledge of the accused that a particular act or failure to act is a violation of law

unless and until outweighed by evidence to the contrary. The presumption is that every person knows what the law forbids and what the law requires to be done.

"However, evidence if any that the accused acted or failed to act because of ignorance of the law is to be considered in determining whether or not the accused acted or failed to act with specific intent as alleged."

To this charge defendants' counsel announced that he had no objection. Hence, its correctness *vel non* is not an issue on appeal. In dissenting, however, I may say that the district court's charge is an admirable statement of the law as I understand it.

Certainly, I submit, the majority goes too far in ordering the informations dismissed. The appellants' brief goes no further than to "submit that the Trial Judgment should be reversed and a new trial granted." That is permissible under *Bryan v. United States*, 1950, 338 U.S. 552, 560, and is the extreme length to which this Court should go under any view.

I respectfully dissent.

APPENDIX B

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19,827

ALBERT EDWARDS,
Appellant,

versus

UNITED STATES OF AMERICA,
Appellee.

No. 19,828

S. FRANK EDWARDS,
Appellant,

versus

UNITED STATES OF AMERICA,
Appellee.

Appeals from the United States District Court for the Southern District of Florida.

ON PETITION FOR REHEARING EN BANC

(July 10, 1964.)

Before TUTTLE, Chief Judge, and RIVES, JONES, BROWN, WISDOM, GEWIN and BELL, Circuit Judges.*

*Judge Hutcheson did not participate in this case.

RIVES, Circuit Judge: The defendants, Albert Edwards and Frank S. Edwards, were convicted of violating 26 U.S.C. §7203 by willfully failing to register for and pay the gambling tax as required by 26 U.S.C. §§4411, 4412.[1] On appeal, this Court by a majority vote reversed the judgments of conviction for lack of proof that the defendants had knowledge of the law. 321 F.2d 324. The case is now before the Court en banc on a petition for rehearing filed by the United States.[2]

---

[1] "§4411. *Imposition of tax*

"There shall be imposed a special tax of $50 per year to be paid by each person who is liable for tax under section 4401 or who is engaged in receiving wagers for or on behalf of any person so liable."

"§4412. *Registration*

"(a) *Requirement.* — Each person required to pay a special tax under this subchapter shall register with the official in charge of the internal revenue district —. . . ."

"§7203. *Willful failure to file return, supply information, or pay tax*

"Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015 or section 6016), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution."

[2] Judge Hays, the organ of the Court on the original opinion, is a judge of the Second Circuit who was sitting by designation. Judge Cameron, who concurred with Judge Hays, died on April 5, 1964, after a rehearing en banc was ordered but before the case was orally argued and submitted on rehearing. I asked the advice of my brothers, stating to them that "since neither Judge Hays nor Judge Cameron can participate in the en banc rehearing on Monday, May 11, it seems to me that to insure complete fairness to both sides, and especially the appearance of fairness to the appellants,

The crucial questions presented are: (1) Was there sufficient evidence that defendants *willfully* failed to register for and pay the gambling tax? (2) Was the district court's charge[3] that the defendants are pre-

---

I should recuse myself and let this case be considered and decided by the remaining active judges of the Circuit."

Chief Judge Tuttle and Judges Jones, Brown and Gewin advised that I should sit, and Judge Bell advised that he agreed with my tentative view but did not think it inappropriate for me to sit. I did not hear from Judges Hutcheson and Wisdom.

After such study as I could give the matter, I reached the conclusion that whether a judge should recuse himself in a particular case depends not so much on his personal preference or individual views as it does on the law, and that, under the law, I have no choice in this case.

It is a judge's duty to refuse to sit when he is disqualified but it is equally his duty to sit when there is no valid reason for recusation. Banco Nacional de Cuba v. Sabbatino, 2d Cir. 1962, F.2d 845, 860, reversed on the merits by Supreme Court on March 23, 1964, No. 16, Oct. Term 1963, ms.; United States v. Valenti, D.C. N. J. 1954, 120 F. Supp. 80, 82; 48 C.J.S. Judges, §93a. If a party is dissatisfied and makes timely objection, a judge's decision to refuse to act on a case is subject to review. Medlin v. Taylor, Ala. 1893, 13 So. 310; 48 C.J.S. Judges, §93b. The only two statutes on disqualification which I found are §§ 47 and 455 of Title 28, United States Code, neither of which would appear to have any application to my situation. Judges sit as a matter of course on rehearings of their own decisions. See 30A Am. Jur. Judges, §185. If either or both of the other judges who participated in the original decision could sit on the en banc rehearing there could be no question that I must also sit. While their absence makes me prefer not to sit, I have not found that it furnishes me any legal excuse.

A court en banc consists of "all active circuit judges of the circuit," 28 U.S.C. §46(c). In the absence of a valid legal reason, I have no right to disqualify myself and must sit.

[3]In its oral charge, the district court instructed the jury as follows:

"Now, you will note that the omission or failure to act charged in the information is alleged to have been willfully done. A failure to act is willfully done if done voluntarily and purposely and with a specific intent to fail to do what the

sumed to have known the law erroneous? (3) If the charge as given was erroneous, was it such "plain error" as to call for a reversal?[4] We answer the first question in the affirmative, the second in the negative but with a slight reservation on the charge as given, and the third in the negative. The result is that we affirm the judgments of conviction.

The defendants were allegedly engaged in a lottery operation, called Cuba or bolita, conducted from a house admittedly owned by defendant Frank Edwards. A search of the house under a search warrant disclosed the paraphernalia used in such lottery operations: memo pads, adding machine tapes, tally sheets or recap sheets of sellers or pickup men, cards used to notify buyers of the winning number, a short-wave radio, and a telephone listed in the name of Frank Edwards. A qualified expert on bolita operations testified to the necessity of keeping on hand a large amount of cash. When Frank Edwards was arrested at the Green Pal-

---

law requires to be done. That is to say, with that purpose either to disobey or disregard the law.

"It is not necessary for the prosecution to prove knowledge of the accused that a particular act or failure to act is a violation of law unless and until outweighed by evidence to the contrary. The presumption is that every person knows what the law forbids and what the law requires to be done."

[4]See Rule 52(b), Fed.R.Crim.P. The district court, at the conclusion of its oral charge, complied strictly with Rule 30, Fed.R.Crim.P., as shown by the following colloquy:

"THE COURT: In the absence of the Jury and at the conclusion of the Court's oral Charge to the Jury, does the Government have any objections or exceptions to the Oral Charge as given?

"MR. HANLON: No, Your Honor. The Government has no objections or exceptions.

"THE COURT: In the absence of the Jury and at the conclusion of the Court's Oral Charge to the Jury, do the defendants have any objections or exceptions to the Oral Charge as given?

"MR. LEE: No, sir."

ace Bar, which is in front of the house from which the lottery was conducted, he had in his pocket $71.47 and in a bag on his person $1,091.47. There was considerable testimony about a five-gallon can which Frank Edwards had on occasions carried. The can filled with various lottery paraphernalia was found under the house next door to that from which the operations were conducted. Frank Edwards had been observed meeting various persons in the parking lot behind the Green Palace Bar and accepting packages from them; he had been observed in and out of the house where the lottery was conducted. He was also seen carrying paper sacks under his shirt and retrieving sacks left for him in the mail box.

Two paid informers had purchased bolita tickets from Albert Edwards in the Green Palace Bar, and had seen other persons making similar purchases from him. Frank Edwards at the time of his arrest admitted ownership of the house, but claimed that it was rented out, although he refused to reveal to whom it was rented. Frank had been arrested for a bolita offense in 1949. Both defendants testified at the trial and denied being in the bolita business. Neither of the defendants stated whether or not he was aware of the duties imposed by the gambling tax.

The majority of the original panel took the Government's position to be that ignorance of the law is no defense in a prosecution for willful failure to register for and pay the federal wagering tax. Accordingly, the majority opinion was primarily concerned with showing that "willfulness" requires knowledge of the law. The concurring opinion[5] and footnote 3 of the majority opin-

---

[5]321 F.2d at 327.

ion[6] indicated that the Government has the burden of proving knowledge and that there is no presumption that the defendants knew of the wagering tax requirements. The dissent[7] contended that some presumption of knowledge does exist.

On petition for rehearing the Government has conceded that since the misdemeanor includes the element of willfulness ignorance of the law is a defense, but contends that there was no evidence of such ignorance and there was sufficient evidence that the defendants knew the law so as to support the jury verdicts. In reviewing the sufficiency of the evidence, this Court must view the evidence in the light most favorable to the prosecution and permissible inferences supporting its case must be so drawn. Accordingly, the first issue to be decided is whether there is evidence from which the jury could have inferred beyond a reasonable doubt[8] that the defendants had knowledge of the duties imposed upon them by the wagering tax statutes. If so, since the evidence conclusively establishes that the defendants failed *both* to register for and to pay the tax, the test of willfulness is met. As said in *Spies v. United States*, 1943, 317 U.S. 492, 497, 498:

> "The difference between willful failure to pay a tax when due, which is made a misdemeanor, and willful attempt to defeat and evade one, which is made a felony, is not easy to detect or define. Both must be willful, and willful, as we have said, is a word of many meanings, its construction often being influenced by its con-

---

[6]321 F.2d at 326-27, n. 3.
[7]321 F.2d at 327.
[8]See Riggs v United States, 5 Cir. 1960, 280 F.2d 949, 955.

text. *United States v. Murdock*, 290 U.S. 389. *It may well mean something more as applied to nonpayment of a tax than when applied to failure to make a return. Mere voluntary and purposeful, as distinguished from accidental, omission to make a timely return might meet the test of willfulness.* But in view of our traditional aversion to imprisonment for debt; we would not without the clearest manifestation of Congressional intent assume that mere knowing and intentional default in payment of a tax, *where there had been no willful failure to disclose the liability,* is intended to constitute a criminal offense of any degree. We would expect willfulness in such a case to include some element of evil motive and want of justification in view of all the financial circumstances of the taxpayer." (Emphasis supplied.)

In the instant case there is no direct proof that the defendants knew of the duties imposed by the federal gambling tax statute—they neither admitted nor denied such knowledge, and there was no evidence that they had been warned of their obligation or that they had previously paid the tax. But knowledge of the law, a state of mind, may be proved by circumstantial evidence.[9]

What circumstantial evidence will permit an inference of knowledge in wagering tax cases? We believe the answer lies in *Ingram v. United States*, 1959, 360 U.S. 672. In that case two defendants, Ingram and Jenkins, were convicted of conspiring to evade and defeat the

---

[9]Cf. Gaunt v. United States, 1 Cir. 1950, 184 F.2d 284, 290; Batties v. United States, 6 Cir. 1949, 172 F.2d 1, 5; 10 Mertens *Federal Income Taxation* §55A.09 at n. 13 (1958).

wagering tax and of willfully failing to register for and pay the tax. Two other defendants, Smith and Law, although not required by law to pay the tax since they were neither "writers" nor "bankers," were nevertheless convicted of conspiracy to attempt to evade or defeat the tax. The defendants had been engaged in a closely organized and large-scale operation of a numbers game in violation of state law from 1954 to 1957. They made every effort to conceal the operation—*e.g.*, they used false license plates, evasive routes, and false names and even attempted bribes. The Supreme Court noted: "There was no direct evidence to show that any of the petitioners knew of these taxes."[10] The Court held that there was sufficient evidence to support the convictions of Ingram and Jenkins. As to Smith and Law, the Court held that there was no evidence to indicate that they knew that Ingram and Jenkins had not paid these taxes, and without such knowledge Smith and Law could not have conspired to evade the tax. A minority of the Court dissented as to Ingram and Jenkins, being of the opinion that mere concealment should not be enough to infer knowledge that a tax is imposed.[11]

In the instant case. the defendant Frank Edwards was arrested for a bolita offense as far back as 1949.[12]

---

[10]360 U.S. at 674.

[11]360 U.S. at 682.

[12]On cross-examination, Frank Edwards testified:

"Q Is it your testimony here today that you have never engaged in the bolita business?

"A. That's right.

"Q. Ever; is that correct?

"A. (No response.)

"Q. Is that your testimony today, Mr. Edwards?

"A. I am trying to think back.

"Q. You are under oath, and I want you to take your time and reflect.

He purportedly had rented the house to someone else; whereas, in fact, he used it to carry out his gambling operation. He accepted packages at night in the parking lot behind the bar, hid the can containing lottery paraphernalia under the house next door, carried paper sacks under his shirt, and retrieved paper sacks left for him in the mail box.[13] This long experience in the lottery business and concealment of operations is enough under the *Ingram* case to allow the jury to infer that Frank Edwards was aware of the wagering tax.[14]

While the circumstantial evidence against Albert is not as strong as that against Frank, Albert was a "writer" and is Frank's son, so that the jury could reasonably infer that Albert knew of the law himself or that Frank passed this knowledge on to him. As to Albert, however,

---

"A. Yes. Back in '49, I think it was.
"Q. You were in the bolita business?
"A. I got arrested.
"Q. You were here in the Courtroom and heard various witnesses testify that you were delivered sacks of I don't know what. What is your statement with respect to those sacks that they discussed as being delivered to you by various people?
"A. My statement is that I didn't receive any sacks from no one."

[13] It is interesting to note that in 1953 the Florida Legislature passed a statute making the possession of or payment for a federal wagering tax stamp prima facie evidence of violation of the Florida gambling law. In 1954, however, the Florida Supreme Court held this statute to be unconstitutional. Jefferson v. Sweat. 1954 Fla., 76 So.2d 494, 498-501 (opinion on rehearing)

[14] In United States v. McGonigal, D.Del. 1963, 214 F.Supp. 621, the court entered a judgment of acquittal for lack of proof that the defendant knew of the necessity of purchasing a gambling tax stamp; but the court carefully pointed out that this defendant had not engaged in the activity for a persistent or long-drawn-out time, associated frequently with known gamblers, nor engaged in deliberate acts of concealment.

a close question is presented as to whether this inference could be drawn beyond a reasonable doubt as required by *Riggs*, n. 8, *supra*, and we prefer to base our decision on our holding, hereafter elaborated, that the evidence from which the jury might draw the inference of knowledge of the law is aided or supplemented by a rebuttable presumption that the defendants knew the law.

In determining the correctness *vel non* of the court's charge, n. 3, *supra*, it is important to note the distinction between an "inference" and a "presumption." Professor Morgan has defined an inference as follows:

> "If the court means that when [basic fact] A is established in the action, the existence of [presumed fact] *B* may be deduced by the operation of the ordinary rules of reasoning, it sometimes says that the trier of fact may presume the existence of *B* if it finds *A*. The presumption is said to be one of fact, and careful judges and writers insist that the proper term is 'inference' rather than 'presumption.' "[15]

On the other hand, he defines a rebuttable presumption as follows:

> "Thayer, Wigmore, the American Law Institute, and commentators generally have argued, and many courts have agreed, that the term 'presumption' should be used only to mean that when *A* is established in an action, the existence

---

[15] 1 Morgan, *Basic Problems of Evidence* 31 (1961).

of *B* must be assumed unless and until a specified condition is fulfilled."[16]

"Presumption" itself is a word of several meanings. It is often stated that every person is "presumed" to know the law. This "conclusive presumption" is merely a restatement of the substantive rule that ignorance of the law is not a defense; accordingly, many writers object to treating this as a rule of evidence.[17] Of course, in cases such as the instant one, where ignorance of the law is a valid defense, the rule has no application.[18] Here, the defendants are charged with the violation of a statute which makes criminal the willful to comply with specific duties imposed by statute. The problem is whether the jury should have been instructed in terms of an inference or a rebuttable presumption.

---

[16] 1 Morgan, *Basic Problems of Evidence* 32 (1961). Professor Wigmore has warned against confusing a presumption with an inference:

"So long as the law attaches no legal consequences in the way of a duty upon the opponent to come forward with contrary evidence, there is no propriety in applying the term 'presumption' to such facts, however great their probative significance." 9 Wigmore, *Evidence* 288 (1940).

The distinction between inference and presumption was recognized by this Court in Barfield v. United States, 5 Cir. 1956, 229 F.2d 936, 940, and Mann v. United States, 5 Cir. 1963, 319 F.2d 404, 409.

[17] See 1 Jones, *Evidence* §11 (5th ed. 1958); 1 Wharton, *Criminal Evidence* §107 at 215 (12th ed. 1955); 1 Wharton, *Criminal Law & Procedure* §162 (Anderson ed. 1957). Professor Hall has stated: "In such cases, which include the common law felonies and the more serious misdemeanors, instead of asserting that knowledge of law is presumed, it would be much more to the point to assert that knowledge of law (equally, ignorance or mistake of law) is wholly irrelevant." Hall, *Ignorance and Mistake in Criminal Law*, 33 Ind.L.J. 1, 20 (1957).

[18] See Hargrove v. United States, 5 Cir. 1933, 67 F.2d 820; Wardlaw v. United States, 5 Cir. 1953, 203 F.2d 884, 885.

Where knowledge of certain facts is an essential element of a crime, the burden of going forward with the evidence on this issue is sometimes placed on the defendant if the matter is peculiarly within his own knowledge. See *Crapo v. United States,* 10 Cir. 1939, 100 F.2d 996, 1001; 1 Wharton, *Criminal Evidence* §§109, 14 (12th ed. 1955). This principle was extended in *Blumenthal v. United States,* 8 Cir. 1937, 88 F.2d 522, so as to hold that there was a presumption that the defendant had knowledge of a statute imposing a duty to act. The offense charged was *knowingly* transporting alcohol which was not labeled in accordance with the statute. The court said:

> "It is elementary that every one is presumed to know the law of the land, whether that be the common law or the statutory law, and hence, one's ignorance of the law furnishes no defense for criminal acts, and this rule applies whether the crime charged is malum prohibitum or malum in se . . . .
>
> "Assuming, without deciding, that the presumption was a rebuttable one, it is to be observed that the defendants introduced no evidence in an attempt to rebut the presumption. The corpus delicti having been established, and the government having thus proved a prima facie case, the burden of adducing evidence to rebut the presumption shifted to the defendants. The matter was peculiarly within their knowledge. *Agnew v. United States,* 165 U.S. 36, 17 S.Ct. 235, 41 L.Ed. 624."[19]

---

[19] 88 F.2d at 530.

The *Blumenthal* case was followed in *Cruz v. United States*, 10 Cir. 1939, 106 F.2d 828, 830, where Judge Phillips said:

> "Furthermore, if there was a want of knowledge as to the existence of Section 12 on the part of the defendants, that was a fact peculiarly within their knowledge, and when the government established a prima facie case, the burden of adducing evidence to rebut the presumption of such knowledge rested on the defendants. Blumenthal v. United States, supra [8 Cir. 1937, 88 F.2d 522, 530]; Crapo v. United States, 10 Cir., 100 F.2d 996, 1001, and cases cited in note 4."

Professor Perkins has agreed:

> "But in those exceptional situations in which ignorance of the law is an excuse, the case will still be decided as if the law had been known unless the defendant comes forward with evidence to show that he did not know. Stated differently, knowledge of the law is presumed; in most cases this presumption is conclusive but under exceptional circumstances it is disputable."[20]

Professor Hall has stated:

> "It seems necessary to retain the presumption that there was such knowledge [of the law], allowing the defendant to introduce evidence

---

20Perkins, *Ignorance and Mistake in Criminal Law*, 88 U.Pa.L.Rev. 35, 38-39 (1939).

> tending to prove his ignorance or mistake of the law, but placing the final burden of proving *mens rea*, in the above sense, upon the state."[21]

Where the law is plain, definite, and well settled, and any want of knowledge of its requirements is a fact resting peculiarly within the knowledge of the defendants, when the Government has established its case in all other respects, the burden of adducing *some* evidence to rebut the presumption of such knowledge rests on the defendants. A mental state being involved, the presumption of knowledge of the law is analogous to the presumption of sanity as to which the Supreme Court said in *Davis v. United States*, 1895, 160 U.S. 469, 487, 488.

> ". . . In a certain sense it may be true that where the defense is insanity, and where the case made by the prosecution discloses nothing whatever in excuse or extenuation of the crime charged, the accused is bound to produce some evidence that will impair or weaken the force of the legal presumption in favor of sanity. But to hold that such presumption must absolutely control the jury until it is overthrown or impaired by evidence sufficient to establish the fact of insanity beyond all reasonable doubt or to the reasonable satisfaction of the jury, is in effect to require him to establish his innocence,

---

[21] Hall, *Ignorance and Mistake in Criminal Law*, 33 Ind. L.J. 1, 36-37 (1957). See also Ford v. United States, 9 Cir. 1926, 10 F.2d 339, 349, aff'd 1927, 273 U.S. 593; Underhill's *Criminal Evidence*, 4th ed., sec. 45, p. 57.

by proving that he is not guilty of the crime charged.

". . . . . .

"Strictly speaking, the burden of proof, as those words are understood in criminal law, is never upon the accused to establish his innocence or to disprove the facts necessary to establish the crime for which he is indicted. It is on the prosecution from the beginning to the end of the trial and applies to every element necessary to constitute the crime. Given to the prosecution, where the defence is insanity, the benefit in the way of proof of the presumption in favor of sanity, the vital question from the time a plea of not guilty is entered until the return of the verdict, is whether upon all the evidence, by whatever side adduced, guilt is established beyond reasonable doubt. If the whole evidence, including that supplied by the presumption of sanity, does not exclude beyond reasonable doubt the hypothesis of insanity, of which some proof is adduced, the accused is entitled to an acquittal of the specific offence charged."[22]

The charge of the district court as given, n. 3, *supra*, as applied to the plain, definite and well-settled law here involved, would have been more accurate if, instead of the phrase, "unless and until outweighed by evidence to the contrary," it had used some such expression as "unless the defendants produce some evidence to the

---

[22]See also Howard v. United States, 5 Cir. 1956, 232 F.2d 274, 276; Carter v. United States, 5 Cir. 1963, 325 F.2d 697.

contrary."[23] If the failure so to word the charge was error, it was not such plain error as to require a reversal (see n. 4, *supra*); because, in the light of the fact that the defendants produced no evidence whatever to the contrary, the failure to use the more accurate expression did not affect the defendants' substantial rights.

For the reasons stated, the judgments of conviction are AFFIRMED.

JONES and BELL, Circuit Judges, dissenting:

It is our view that these cases were properly disposed of when they were before the panel of this Court. *Edwards v. United States,* 321 F. 2d 324. We therefore DISSENT.

BROWN, Circuit Judge, dissenting:

I dissent. I see no place in this case for the pedagogical dispute over inference *versus* presumption. Nor for this particular crime can I see how the Government meets its burden of showing a willful failure to pay unless it first proves, directly or circumstantially, that the defendant knew that some tax was payable. No doubt the evidence supports the inference that the defendants were engaged in the numbers racket and were aware that it was against Florida law. But none of the indicia elaborated on by the Court's opinion, such as furtiveness, size of the operation, concealment of the tell-tales of the activity,

---

[23] In cases of this kind where the defendant produces *some* evidence of ignorance of the law *no* charge on presumption of knowledge of the law would ordinarily be needed, and it might then contribute to clarity simply to charge the jury on the usual burden of proof.

or the like, even begin to show that this indicated an awareness that a federal tax was due.

Congress can, of course, prescribe that the failure to pay the tax is a crime and thus eliminate the element of a *knowing* duty to pay. But so long as *Spies v. United States,* 1943, 317 U.S. 492, 63 S.Ct. 364, 87 L.Ed. 418; *Hargrove v. United States,* 5 Cir., 1933, 67 F.2d 820; and *Wardlaw v. United States,* 5 Cir., 1953, 203 F. 2d 884, stand, I do not think we may read out *knowledge* by a so-called presumption, rebuttable or otherwise, that an accused knows the law and knowing the law knows he had a duty to pay.

If the result I urge is bad, Congress can correct it. And I am not at all sure the prospect is as formidable as Judge Rives earlier made out in his initial dissent. I would be the first to join in a reversal and remand, *Bryan v. United States,* 1950, 338 U. S. 552, 70 S.Ct. 317, 94 L.Ed. 335, so that the Government could have the opportunity of meeting its burden through circumstantial evidence that must be abundant from which the jury could infer in fact (not be told as a matter of law) that these defendants knew that they were skating on thin ice, both federal and Florida.